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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. LORENZO ALAN PEREZ, Defendant and Appellant.	G043489 (Super. Ct. No. 08NF2977) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue, Judge. Affirmed.

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Lorenzo Alan Perez of driving under the influence (DUI) and with a blood-alcohol concentration (BAC) greater than .08 percent with a prior felony DUI (Veh. Code, §§ 23152, subds. (a) & (b), 23550.5, subd. (a); all statutory references are to the Vehicle Code unless noted). Perez contends the record contains insufficient evidence he was too impaired to drive. For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

Shortly after midnight on September 1, 2008, a Brea police officer received a dispatch concerning a truck traveling in her vicinity, which she soon spotted and followed for several blocks. The officer observed the truck, driven by Perez, travel 60 miles an hour in a 40-mile-per hour zone. The officer activated her lights and siren, and defendant pulled over to the curb. The officer asked defendant for his driver's license, registration, and proof of insurance, but Perez could only supply a California identification card.[1] While looking for registration and insurance information, Perez repeatedly picked up a folder located on the seat next to him, looked inside, and put the folder down. The officer described his actions as "very slow and deliberate."

The officer smelled alcohol on Perez's breath and in the truck. She conducted a horizontal gaze nystagmus test while Perez remained in his seat, instructing him to follow an object as she slowly moved it across his line of vision. Perez's eyeball jerked involuntarily, signaling he had alcohol in his system. The officer directed Perez to step out of his truck so she could question him further. Cooperative and chatty, Perez

[1] During trial, defendant pleaded guilty to driving with a suspended or revoked license. (§ 14601.2, subd. (a).)

admitted consuming two beers at a friend's house between 9:30 p.m. and 11 p.m., and estimated within 15 minutes the correct time.

The officer administered several field sobriety or "divided attention" tests (FSTs). The tests are designed to measure a person's balance and ability to follow directions. The officer directed Perez to put his feet together, tilt his head back, close his eyes and estimate 30 seconds. Perez correctly estimated 30 seconds, but swayed two inches laterally during the test. On the "walk and turn" test, the officer instructed Perez to place his right foot on an imaginary line with his left foot behind the right and to walk in a straight line taking nine heel-to-toe steps while keeping his arms at his sides, and then return in the same fashion. Perez took 10 steps on his outbound walk, missing his heel-to-toe twice, and on his return, he missed once. Although he did not step off the line or lose his balance, his movements were "very slow and deliberate."

The officer next had Perez stand on one leg while raising his other foot six inches off the ground for 30 seconds. Perez held his foot up for 30 seconds, but gripped his pants while maintaining his balance. Perez also recited the alphabet correctly, but slowly "as if he was concentrating."

The officer described each test at the outset, but Perez interrupted and began tests before the officer told him to begin. According to the officer, defendant's performance on the tests was consistent with a person having consumed alcohol.

Perez agreed to take a preliminary alcohol screening (PAS) test. He failed in three attempts to blow enough air into the machine to obtain a reading. The first successful test at 12:42 a.m. registered .10 percent BAC. The second test three minutes later registered .09 percent BAC. The officer formed the opinion defendant had been

driving under the influence of alcohol based on his performance on the FST tests, the PAS results, and objective signs of intoxication, including bloodshot and watery eyes.

A blood sample drawn at 1:35 a.m. registered .088 percent BAC. A forensic scientist from the Orange County crime lab testified alcohol is a central nervous system depressant that slows brain-controlled activities. Signs of impairment include difficulty with divided attention tasks, increased reaction time, and increased risk-taking behavior. As the body absorbs more alcohol, a person may suffer fine motor control impairment, have difficulty maintaining lane position, and exhibit slurred speech. If the person continues to absorb alcohol, he will lose balance and coordination.

The expert explained a person may develop a tolerance to alcohol, and an ability to mask physical symptoms of impairment, by frequent exposure. A person who has developed tolerance may appear to function without gross motor impairment yet still be under the influence when driving a motor vehicle because he is unable to compensate for the resulting mental impairment. A person with alcohol tolerance could pass most FSTs, yet still be under the influence for driving because FSTs do not demand the same level of attention as driving.

The expert testified most people are under the influence for driving purposes at .05 percent BAC, and everyone is under the influence at .08 percent BAC. The expert estimated Perez, weighing 205 pounds, would have had between six and seven standard drinks in his system to achieve a .10 percent BAC, but he would have had a .01 percent BAC if he consumed only two beers between 9:30 and 11:00 p.m. A person would have to consume eight or nine standard drinks between 9:30 and 11:00 p.m. to achieve a .10 percent BAC at 12:42 a.m. Answering a hypothetical drawn from the facts of the case, the expert opined the person was impaired for purposes of driving a vehicle.

Bradley Pearson testified he and Perez had been close friends for over 15 years. On the evening of Perez's arrest, they had planned to go to a bar or club and meet friends. Perez arrived at his home between 7:30 and 8:30 p.m. Beginning around 10:00 p.m., they shared a six-pack of beer, and defendant finished two or three bottles. They brought back food from a nearby fast-food establishment. When Pearson decided he did not want to go out, Perez left around midnight; he consumed his last beer within 30 minutes of his departure.

Pearson initially denied, but ultimately admitted, making the 911 call that resulted in defendant's stop. During the call, he asserted defendant had just left him at a fast-food place, was drunk, driving recklessly, and yelling at people on the road. Pearson testified he and defendant had argued, he was extremely angry, and he wanted to get Perez in trouble

Following a trial February 2010, a jury convicted Perez as noted above. The court found Perez had suffered a felony DUI conviction within the past 10 years (§ 23550.5),[2] and Perez admitted previously serving two separate terms in prison. (Pen. Code, § 667.5, subd. (b).) In March 2010, the court imposed a five-year prison sentence, comprised of the upper three-year term (§ 23550.5, subd. (a); Pen. Code, § 18), plus two one-year terms for each prison term prior. The court stayed an identical term for violating section 23152, subdivision (b).

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[2] Section 23550.5 makes it a potential felony to violate section 23152 where the offense occurs within 10 years of a prior felony violation of section 23152. In September 2003, defendant pleaded guilty to felony DUI having previously suffered DUI convictions in 1997, 1998, and 1999.

II

DISCUSSION

Substantial Evidence Supports Perez's DUI Conviction

Section 23152, subdivision (a), provides: "It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle." "'To be "under the influence" within the meaning of the Vehicle Code, the liquor or liquor and drug(s) must have so far affected the nervous system, the brain, or muscles as to impair to an appreciable degree the ability to operate a vehicle in a manner like that of an ordinarily prudent and cautious person in full possession of his faculties. [Citations.]' [Citation.]" (*People v. McNeal* (2009) 46 Cal.4th 1183, 1192-1193 (*McNeal*); *People v. Canty* (2004) 32 Cal.4th 1266, 1278; *People v. Weathington* (1991) 231 Cal.App.3d. 69, 78.)

Perez argues the evidence shows the presence of "some alcohol in [his] system did not impair his driving ability. He was able to drive his vehicle quite well." He notes he did not swerve, he reacted appropriately when the officer activated her lights and siren, he did not delay his stop, and he pulled over without hitting the curb.[3]

"'In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] Reversal on this ground is unwarranted unless it appears "that upon no hypothesis whatever is there

[3] Defendant's appeal is without practical consequence because defendant does not challenge his conviction for driving with a .08 percent BAC or higher. The trial court imposed, but stayed (Pen. Code, § 654), an identical term for that conviction.

sufficient substantial evidence to support [the conviction]." [Citations.]' [Citations.]" (*People v. Torres* (2009) 173 Cal.App.4th 977, 983 (*Torres*).)

The prosecution produced evidence Perez drove his truck while having a BAC between .10 and .11 percent. Section 23610, subdivision (a), provides: "Upon the trial of any criminal action . . . arising out of acts alleged to have been committed by any person while driving a vehicle while under the influence of an alcoholic beverage in violation of subdivision (a) of Section 23152 . . . , the amount of alcohol in the person's blood at the time of the test as shown by chemical analysis of that person's blood, breath, or urine shall give rise to the following presumptions affecting the burden of proof: [¶] . . . [¶] (3) If there was at that time 0.08 percent or more, by weight, of alcohol in the person's blood, it shall be presumed that the person was under the influence of an alcoholic beverage at the time of the alleged offense."

As noted in *McNeal*, the Legislature has concluded that most people with a BAC at or above .08 percent are too impaired to operate a vehicle safely. (*McNeal*, *supra*, 46 Cal.4th at p. 1197.) "Section 23610 permits, but does not require, the jury to infer that the defendant was under the influence if he had a blood-alcohol level of 0.08 percent or more. [Citations.]" (*Id.* at pp. 1199-1200.) "[I]f a driver's breath test shows a converted blood-alcohol level of 0.08 percent or more, the measurement is generally accurate and may fairly be used to prove the driver was actually under the influence, as the generic DUI statute requires." (*Id.* at p. 1198.) The court instructed the jury in accordance with section 23610.

In addition to the statutory presumption, the prosecution's expert here testified most people are under the influence for driving purposes with a .05 percent BAC. The prosecution's expert also testified a chronic alcoholic can mask symptoms of

being under the influence, but is nevertheless impaired when driving a motor vehicle because a .08 percent BAC affects every person's ability to process driving tasks and exercise judgment.

Other evidence also demonstrated Perez's consumption of alcohol had in fact affected his ability to safely operate a vehicle. (See *McNeal, supra,* 46 Cal.4th at p. 1198 ["Other evidence of actual impairment may include the driver's appearance, an odor of alcohol, slurred speech, impaired motor skills, slowed or erratic mental processing, and impaired memory or judgment"].) Perez exceeded the posted speed limit by 20 miles per hour, an example of increased risk-taking behavior. Perez and his vehicle smelled of alcohol. His eyes were bloodshot and watery, and he appeared confused with the officer's request for documentation by repeatedly picking up a folder located on the seat next to him. He swayed slightly during one of the FSTs, and during another walked 10 steps instead of nine and missed his heel and toe three times. Perez gripped his pants to maintain his balance while standing on one leg, and interrupted the officer while she gave instructions. The jury reasonably could conclude Perez performed all his tasks slowly and deliberately to mask his impairment. Finally, Pearson alerted authorities Perez was drunk and driving recklessly.

Perez's reliance on *Torres, supra,* 173 Cal.App.3d 977 does not support his argument. There, the prosecution charged defendant with driving under the influence of *methamphetamine*. The evidence showed the defendant had methamphetamine in his system, and an expert opined methamphetamine abuse or withdrawal might produce symptoms inconsistent with safe driving at higher doses (including increased risk-taking or temporary blindness). The sole evidence of bad driving was the defendant's failure to bring his truck to a complete stop before the limit line of an intersection. The arresting

officer performed no FSTs, and the prosecution expert stated she could not opine whether a person was actually an unsafe driver without tests demonstrating altered time perception or divided attention.

The appellate court held there was no evidence the defendant's methamphetamine use actually impaired his driving ability on the night of his arrest. The court noted there was no evidence defendant "was driving erratically. [His] failing to stop at the limit line [was] a common traffic violation that [the prosecution's expert] testified [was] not sufficient to establish a person is under the influence for driving purposes. [The expert] also testified [the defendant's] symptoms of fidgetiness, sweatiness, and a high pulse rate [did] not make a person an unsafe driver. Although she testified dilated pupils from methamphetamine use might cause momentary blindness during driving, there is no evidence [the defendant] experienced such blindness." (*Torres*, *supra*, 173 Cal.App.3d at p. 983; accord *People v. Davis* (1969) 270 Cal.App.2d 197 [ample evidence defendant had used a narcotic, but no evidence either in the form of expert opinions or firsthand observations he lacked the alertness, judgment, and coordination necessary to prudently and cautiously operate a motor vehicle]; cf. *People v. Benner* (2010) 185 Cal.App.4th 791, 796 [distinguishing *Torres*].)

Here, unlike *Torres*, Perez's level of alcohol intoxication gave rise to a statutory inference of impairment. In contrast, there was no statutory analog for methamphetamine usage that could be relied upon in *Torres*. Perez's speeding, appearance and conduct at the time of his detention, performance on FSTs, and expert opinion augmented that inference. Substantial evidence therefore supports defendant's conviction for driving under the influence in violation of section 23152, subdivision (a).

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

BEDSWORTH, J.